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# Supreme Court of the United States

**OCTOBER TERM, 1980**

No. 79-1213

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,

*Petitioners,*

*against*

CALIFORNA DEPARTMENT OF CORRECTIONS, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

## *AMICUS CURIAE* BRIEF OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES IN SUPPORT OF RESPONDENTS

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Consent of the Parties | 1 |
| Interest of *Amicus* | 2 |
| Questions Presented | 4 |
| Statement of Facts | 4 |
| POINT I—The Depatrment's Affirmative Action Plan does not violate the Equal Protection Clause of the Fourteenth Amendment | 4 |
| A. The Affirmative Action Plan Does Not Impose an Unconstitutional Racial or Gender-Based Classification | 4 |
| B. In Any Event, the Department's Consideration of Rate and Gender in Promotion and Hiring Is Constitutional | 7 |
| 1. The State of California Has A Compelling Interest In Alleviating The Effects Of Prior Discrimination In Its Department of Corrections | 7 |
| 2. The State of California Has A Compelling Interest In Ameliorating Prison Conditions | 11 |
| 3. The AAP Is A Necessary Means To Further California's Compelling Governmental Interests | 12 |
| POINT II—The Department's Affirmative Action Plan does not violate Title VII | 13 |
| Conclusion | 15 |

**Cases:** PAGE

*Bell* v. *Wolfish,* 441 U.S. 520 (1979) ..... 11

*Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commn.,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975) ..... 6

*Califano* v. *Webster,* 430 U.S. 313 (1977) ..... 7

*Detroit Police Officers' Assn.* v. *Young,* 608 F.2d 671 (6th Cir. 19979), *petition for cert. pndg.* (No. 79-1080) ..... 9, 11

*Dothard* v. *Rawlinsn,* 433 U.S. 321 (1977) ..... 13

*Fullilove* v. *Klutznick,* —— U.S. ——, 48 U.S.L.W. 4979 (July 2, 1980) ..... 7, 8, 9, 12

*Green* v. *County School Board,* 391 U.S. 430 (1968) .. 8

*Guardians Assn. of the New York City Police Department* v. *Civil Service Commn. of the City of New York, Slip.* Op. 4755, Docket No. 80-7027 (2d Cir. July 31, 1980) ..... 6

*Kahn* v. *Shevin,* 416 U.S. 351 (1974) ..... 7

*Kirkland* v. *New York State Department of Correctional Services,* Slip. Op. 5071, Docket No. 80-7129 (2d Cir. August 18, 1980) ..... 3, 6

*Kirkland* v. *New York State Department of Correctional Services,* 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part, rev'd in part,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976) 2

*Loving* v. *Virginia,* 388 U.S. 1 (1967) ..... 5

*Maehren* v. *City of Seattle,* 92 Wash.2d 480, 599 P.2d 1255 (Sup. Ct. 1979), *petition for cert. pndg.* (No. 79-1061) ..... 9

*National League of Cities* v. *Usery,* 426 U.S. 833 (1976) ..... 9

PAGE

*Pell* v. *Procunier*, 417 U.S. 817 (1974) ..... 11

*Price* v. *Civil Service Commn. of Sacramento County*, 161 Cal.Rptr. 475, 604 P.2d 1365 (Sup. Ct. 1980), *appl. pndg.* ..... 9

*Procunier* v. *Martinez*, 416 U.S. 396 (1974) ..... 11

*Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) .....5, 6, 7, 8, 10, 11

*Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) ..... 7

*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) ..... 8

*United Jewish Organizations of Williamsburg* v. *Carey*, 430 U.S. 144 (1977) ..... 7, 8

*United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) .....11, 13, 14

**Statutes and Regulations:**

23 C.F.R. § 42.306(c) ..... 6

38 Fed. Reg. 23516 ..... 6

9 New York Code of Rules & Regulations § 3.40 .... 3

Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. .. 13

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## *AMICUS CURIAE* BRIEF OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES IN SUPPORT OF RESPONDENTS

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### Opinions Below

The opinion of the California Court of Appeal is reported at 95 Cal.App.2d 506, 157 Cal.Rptr. 260 (1979).

The order of the California Supreme Court denying Petitioners' Petition for Hearing is reported at 25 Cal.3d, Minutes 2 (No. 23 Cal. Official Reports).

### Consent of the Parties

Pursuant to Rule 36 of the Rules of this Court, Respondent, by letter dated September 19, 1980, and Petitioners,

by letter dated October 7, 1980 gave consent for the New York State Department of Correctional Services to file a brief *amicus curiae.*

## Interest of *Amicus*

The New York State Department of Correctional Services currently maintains 32 correctional facilities that house over 21,600 inmates. To carry out its statutorily mandated responsibilities to these inmates, the Department employs 11,757 persons in a myriad of job titles. As is true in California, historically very few of these employees have been members of ethnic-racial minority groups or women.

The State Department of Correctional Services has a vital interest in the outcome of this litigation for two related reasons.

*First,* similar relief has been implemented in litigation in New York. Since 1973, the Department has been a defendant in litigation challenging its employment practices as discriminatory. In *Kirkland* v. *New York State Department of Correctional Services,* 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part, rev'd in part,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), the Department's civil service examination for promotion to correctional officer-sergeant was challenged for having a discriminatory impact on black and Hispanic employees. The ultimate result of this litigation was the development of a new written test that was administered to candidates for promotion in December, 1978. Pursuant to district court directive, a validation study was done to determine if the new test was job-related. The validation study results revealed that black candidates scored on the average, 268 points lower than white candidates on the written portion of the test, and that both groups of candidates scored equally well on the performance portion of the test.

The Department then *voluntarily* added 250 points to the total scores of minority candidates. This race-conscious, voluntary remedy was specifically approved by the Second Circuit Court of Appeals. *Kirkland* v. *New York State Department of Correctional Services,* Slip. Op. 5071, Docket No. 80-7129 (2d Cir., August 18, 1980). The Department therefore is vitally concerned that voluntary efforts—such as California's and its own—designed to remedy the effects of demonstrated discrimination be approved by this Court. It should not be necessary for either the California or New York agencies to be compelled to defend lawsuits such as *Kirkland,* and, after seven years of expensive litigation, have courts order remedies the agencies could otherwise undertake voluntarily.

*Second,* and perhaps more importantly, the Department is now in the final stages of developing a comprehensive affirmative action program. Like California's this program is required by an executive order of the Governor that applies to all New York State agencies and departments,* and resulted from legislative and executive recognition of serious problems of past underutilization of ethnic-racial minorities and women in State employment.

The Department has structured its plan based on two considerations. First, that acknowledged past underutilization of minorities (and women) in all phases of employment requires specific goals and timetables as a remedy. Second, the increasing concentration of minority inmates requires a commitment to staff prisons with large numbers of minority corrections officers to ensure safety and promote rehabilitation.

Therefore, given New York State's strong commitment to voluntary affirmative action programs, *amicus* submits this brief uring affirmance of the decision below.

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* 9 New York Code Rules & Regulations § 3.40 (Governor's Executive Order 40.1).

## Questions Presented

1. Does the Equal Protection Clause of the Fourteenth Amendment prohibit the California Department of Corrections from voluntarily adopting a race—and gender—conscious affirmative action program to further California's compelling interests of remedying the effects of past discrimination and furthering safety and rehabilitation in its prisons?

2. Does Title VII of the Civil Rights Act of 1964 prohibit the California Department of Corrections from voluntarily adopting a race—and gender—conscious affirmative action program to further California's compelling interests of remedying the effects of past discrimination and furthering safety and rehabilitation in its prisons?

## Statement of Facts

*Amicus curiae* New York State Department of Correctional Services relies on the statement of facts contained in Respondents' Brief to this Court.

## POINT I

### The Department's Affirmative Action Plan does not violate the Equal Protection Clause of the Fourteenth Amendment.

#### A. The Affirmative Action Plan Does Not Impose an Unconstitutional Racial or Gender-Based Classification

The California Department of Corrections' (the "Department") Affirmative Action Plan ("AAP") does not classify employees according to race or gender, but merely requires consideration of these as positive factors in the evaluation of candidates for promotion. Thus, this case is entirely different from this Court's decisions striking

down racial- or gender-based classifications as violating the Equal Protection Clause. *E.g., Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978) (*"Bakke"*); *Loving* v. *Virginia,* 388 U.S. 1 (1967).

The difference between an unconstitutional racial classification and the constitutional consideration of race as a factor in an affirmative action program was of course discussed in detail by this Court in *Bakke.* There the admissions program reserved sixteen out of the 100 seats for minority applicants. Although the parties to the litigation disputed whether this reservation could more appropriately be characterized as a "quota" or "goal," this Court characterized that distinction as "semantic," and went beyond the labels to the substance of the program which raised constitutional questions:

> The special admissions program is undeniably a classification based on race and ethnic background. . . . Whether this limitation [of sixteen places] is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.
>
> *Bakke,* 438 U.S. at 289.

Unlike the program in *Bakke,* the Department's AAP draws no line based on race or gender. It does not contain any restriction on the numbers of employees of each race or gender who may be eligible for promotion; no employee may be promoted solely because of race or gender; and no employee is denied consideration for promotion because he or she is white, or male. Rather, the AAP embodies precisely what Justice Powell in *Bakke** described as permissible use of race in an evaluative procedure: race (and here, gender) are considered positive factors in an overall promotion system which looks to many factors before each

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* *A fortiori,* the AAP is acceptable to a majority of this Court under the reasoning of Justice Brennan's opinion in *Bakke.*

decision is made. *Bakke,* 438 U.S. at 318. *See also, Kirkland* v. *New York State Department of Correctional Services,* Slip. Op. at 5076, Docket No. 80-7129 (2d Cir. August 18, 1980).

Petitioners make much of the percentage goals for minority employment contained in the AAP, and the Department's overall objective of balancing the inmate and employee populations according to race.* However, petitioners fail to acknowledge that these percentages had nothing whatsoever to do with the actual operation of the AAP in selecting or promoting employees. No percentages were applied to require a certain number of minority promotions or hires.** Instead, the Department used competitive civil service examinations, ranked the applicants, and, pursuant to California law, limited selection to one out of the three highest scores. Only then would race be considered as a factor in choosing from among candidates. The results—which belie petitioners' contentions—were that over 70% of the persons promoted under the AAP are non-minority. The AAP treats each applicant as an individual and

> the applicant who loses out . . . to another candidate receiving a 'plus' on thebasis of ethnic background will not have been foreclosed from all consideration

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* This objective incorporated the Law Enforcement Assistance Administration guidelines directing the percentage of minorities in the workforce to constitute 70% of the minority inmate population. See 38 Fed. Reg. 23516; 23 C.F.R. § 42.306(c).

** Even fixed percentages for hiring or promotion are not always unconstitutional. *See Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commn.,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975); *Guardians Assn. of the New York City Police Department* v. *Civil Service Commn. of the City of New York,* Slip Op. 4755, Docket No. 80-7027 (2d Cir. July 31, 1980). Justice Powell acknowledged this in *Bakke* concluding that the special admissions program would have passed constitutional muster had certain findings of past discrimination been made. (See below.)

for that seat simply because he was not the right color or had the wrong surname.

*Bakke,* 438 U.S. at 319 (Opinion of Powell, J.).

### B. In Any Event, the Department's Consideration of Rate and Gender in Promotion and Hiring Is Constitutional

This Court has repeatedly determined that governmental use of racial criteria is not necessarily a violation of the Equal Protection Clause. *Fullilove* v. *Klutznick,* —— U.S. ——, 48 U.S.L.W. 4979, 4988 (July 2, 1980) (*"Fullilove"*); *Bakke,* 438 U.S. 265, 287 (Powell, J.); *United Jewish Organizations of Williamsburg, Inc.* v. *Carey,* 430 U.S. 144, 161 (1977) (*"UJO* v. *Carey"*). Government affirmative action plans like the one at issue here satisfy this Court's "strict scrutiny" test if they are "a necessary means of advancing a compelling governmental interest." *Fullilove,* 48 U.S.L.W. at 4992 (Powell, J.); *Bakke,* 438 U.S. at 305 (Powell, J.).*

#### 1. The State of California Has A Compelling Interest In Alleviating The Effects Of Prior Discrimination In Its Department of Corrections

At the time of the development of the AAP, race and sex discrimination in employment by the California Department of Corrections were matters of established fact, if not outright Department policy.** The Department's voluntary efforts to eliminate the effects of these discriminatory practices further a compelling interest, as this Court has

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* Moreover, gender-based classifications have been approved by this Court to remedy the effects of general, societal discrimination. *Califano* v. *Webster,* 430 U.S. 313, 317 (1977); *Kahn* v. *Shevin,* 416 U.S. 351, 353-355 (1974). Clearly then the Department's AAP, designed to remedy the effects of its prior policy of excluding women from positions in the Department, is constitutional. *See Schlesinger* v. *Ballard,* 419 U.S. 498, 508-509 (1975).

** See Statement of the Case contained in Respondent's Brief.

repeatedly held. *Bakke,* 438 U.S. at 307; *Fullilove,* 48 U.S.L.W. at 4986 (Opinion of Burger, C.J.), 4992 (Powell, J. concurring); *UJO* v. *Carey,* 430 U.S. at 156-159; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971); *Green* v. *County School Board,* 391 U.S. 430, 437-438 (1968). The use of racial criteria or classifications to remedy past discrimination is justified where a duly-empowered body—executive, legislative or judicial—makes findings of past discriminatory practices.

> Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In Bakke, the Regents failed both requirements.
>
> *Fullilove,* 48 U.S.L.W. at 4992-4993.*

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* Although the specific language of this test is contained in the separate opinion of Justice Powell, it is clear that the Chief Justice and Justices Brennan, White, Marshall and Blackmun agreed that congressional findings of past discrimination justified the race-conscious remedy of the Minority Business Enterprise ("MBE") provision of the Public Works Act of 1977.

> "The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an

*(footnote continued from preceding page)*

The Department's AAP satisfies both of these requirements. *First,* clearly state legislatures and executives, as well as Congress and the federal courts, possess authority to make findings and impose remedies for race and sex discrimination. *E.g., Price* v. *Civil Service Commission of Sacramento County,* 161 Cal.Rptr. 475, 604 P.2d 1365 (Sup. Ct. 1980), *appl. pndg.; Detroit Police Officers' Assn.* v. *Young,* 608 F.2d 671, 694 (6th Cir. 1979), *petition for cert. pndg.* (No. 79-1080); *Maehren* v. *City of Seattle,* 92 Wash.2d 480, 599 P.2d 1255 (Sup. Ct. 1979), *petition for cert. pndg.* (No. 79-1061). In fact, state legislatures and executives have unique authority regarding hiring and promotion of a state's own employees. *See, e.g., National League of Cities* v. *Usery,* 426 U.S. 833 (1976). And certainly once findings are made, the legislature or executive may direct subordinate agencies or departments to carry out the remedial mandate by, for example, requiring the development of affirmative action plans.

*Secondly,* in this instance, California made substantial legislative and executive findings of past discrimination to justify the development of a race- and gender-conscious affirmative action program. In 1971 and again in 1977 (prior to the extension of the AAP in 1979) the California

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*(footnote continued from preceding page)*

effect on interstate commerce. Thus Congress could take necessary and proper action to remedy the situation." *Fullilove,* 48 U.S.L.W. at 4986. (Opinion of the Chief Justice).

"As the Court demonstrates . . . it is indisputable that Congress' articulated purpose for enacting the set-aside provision was to remedy the present effects of past racial discrimination. . . . In these circumstances, remedying these present effects of past racial discrimination is a sufficiently important governmental interest to justify the use of racial classifications." *Id.* at 4998. (Opinion of Justice Marshall).

legislature held hearings and considered evidence of discriminatory employment practices in state civil service. As a result the legislature issued directives designed to improve the existing employment situation, evidencing a commitment to non-discriminatory employment practices. Included on both occasions were specific directives to implement affirmative action programs. Furthermore, beginning in 1971, then-Governor Reagan made findings and issued executive orders regarding discrimination in state employment. His final order requiring that written affirmative action plans be developed by each state agency and department provided the mandate for the Department's development of the plant in question here.

Clearly therefore, the Department did not make its own findings of discrimination or develop the AAP in isolation (as did the Davis Medical School), but did so as the result of concrete legislative and executive mandates. Cf. *Bakke,* 438 U.S. at 309 (Opinion of Powell, J.). In addition the Department, the agency of state government closest to and most familiar with past discriminatory practices and policies, made its own findings prior to the development of the AAP. In essence, the state *admitted* the existence of discrimination and its own responsibility to correct it.*

A holding in this case that state governments and agencies do not have the authority to make such findings or voluntarily adopt appropriate remedies will only serve to discourage candor and prompt remedial action by state governments. In fact, the result of a ruling in favor of petitioners will be that *all* victims of discrimination will be required to resort to our already overburdened courts for vindication of their rights to be free from unlawful

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* This type of self-analysis of unlawful practices—perhaps risking potential liability—is therefore particularly likely to be searching and accurate. One would assume that the Department would err—if at all—on the side of not finding past discrimination and present disproportionate results.

discrimination.* And avoidance of litigation is not all that is at stake here. As this Court itself has acknowledged, remedial programs undertaken voluntarily are met with less resistance and greater acceptance than those which are imposed, *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) (*"Weber"*), and this is especially so when the legislature *and* executive have both indicated approval.

### 2. The State of California Has A Compelling Interest In Ameliorating Prison Conditions

Remedying the effects of past discrimination is not the sole compelling governmental interest that will justify race-conscious affirmative action programs. In *Bakke,* Justice Powell found that the state's interest in ensuring a diverse student body could justify a race-conscious admissions program though not the specific program at issue there. *Bakke,* 438 U.S. at 311-315.

As is evident from many decisions of this Court, states have an overriding interest in ensuring safety—both of prisoners and employees—in their correctional facilities. *Bell* v. *Wolfish,* 441 U.S. 520 (1979); *Pell* v. *Procunier,* 417 U.S. 817 (1974); *Procunier* v. *Martinez,* 416 U.S. 396 (1974). Moreover, once a state chooses to incarcerate an individual it acquires a substantial interest in, if not an obligation to provide for, that prisoner's rehabilitation.

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* "Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action." *Bakke,* 438 U.S. at 364 (Opinion of Brennan, White, Marshall and Blackmun, JJ.). *See also Detroit Police Officers' Assn.* v. *Young,* 608 F.2d at 694.

There can be no doubt that racial tensions have contributed to unsafe and volatile prison conditions and have hampered rehabilitative efforts in institutions where there are many minority inmates and few minority corrections officers. A state is certain free to conclude, as California has here, that a corrections officer and employee population that more closely reflects the racial composition of inmate population will significantly advance the interests of safety, peace and rehabilitation. There was substantial evidence below to support these conclusions.

### 3. The AAP Is A Necessary Means To Further California's Compelling Governmental Interests

It is abundantly clear from the record below that absent consideration of race and gender in hiring and promotion decisions, the gross under representation of minorities and women in the Department's workforce would continue. A Similar remedy for the construction industry was deemed necessary by Congress, and was approved by this Court in *Fullilove*. 48 U.S.L.W. at 4988, *et seq.**

Moreover, the AAP does not raise any of the problems with race-conscious programs outlined by this Court. It is narrowly drawn so as not to disadvantage any particular white or male employee, *all* of whom are still eligible for *all* promotions under the AAP. (In fact, petitioners can point to no one individual who has been disadvantaged by the AAP.) The AAP, fitting into the California civil service framework, operates in tandem with waiver and grievance mechanisms, and is subject to extensive oversight. More importantly perhaps, and unlike the *Fullilove* situation, the California legislature and executive branches

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* The *Fullilove* court paid particular and appropriate deference to Congress in fashioning a remedy for historic discrimination in this industry. No less deference should be paid to properly authorized state officials in fashioning a remedy to further their compelling interests.

did not have to mandate affirmative action for unwilling third parties, but undertook it themselves, voluntarily. *Cf. Weber,* 43 U.S. 193.

## POINT II

### The Department's Affirmative Action Plan does not violate Title VII.

In *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979), this Court held that voluntary, race-conscious affirmative action plans are permissible under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* if "[t]he purposes of the plan mirror those of the statute" and "the plan does not unncessarily tramel the interests of white employees." 443 U.S. at 208. The purpose of Title VII and the plan in *Weber*—"to eliminate conspicuous racial imbalance in traditionally segregated job categories"—clearly is also the objective of the AAP. And, as discussed above, interests of white employees are only minimally affected by the APP.

To dispose of petitioners' claims of violations of Title VII, it suffices to point out that, since 1972, the employment practices that are forbidden or permissible under Title VII are the same for government and private employers. *Dothard* v. *Rawlinson,* 433 U.S. 321, 331 n. 14 (1977).

Finally, the AAP was adopted by the Department voluntarily, and without the necessity of a judicial finding of discrimination or remedial order. As stated by Mr. Justice Brennan in *Weber,* 433 U.S. at 204:

> The very statutory words [of Title VII] intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ig-

> nominious page in this country's history," Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

It would perhaps be more ironic still if this law were held to prohibit states from voluntarily taking measures, which may serve as an example to all private employers, to remedy the discriminatory effects of their own past practices.*

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* It should also be noted that the plan in *Weber* involved a 50% "quota" or set-aside for minority employee-trainees. In merely considering race and gender as "plus factors" the Department's AAP is not nearly as rigid as the plan approved by this Court in *Weber*.

## CONCLUSION

**For the above-stated reasons, the decision of the Court of Appeal, First Appellate District of the State of California should be affirmed.**

Dated: New York, New York
October 15, 1980

Respectfully submitted

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